Supreme Court, U.S.
FILED

96 597 OCT 15 1996

No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

EDUARDO HERNANDEZ,

Petitioner,

v.

MARVIN RUNYON, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

ARTHUR SCHOFIELD, ESQ.
JAMES K. GREEN, P.A.
One Clearlake Centre
Suite 1602
250 Australian Ave. South
West Palm Beach, Florida 33401
(561) 659-2029
Fla. Bar No. 984434
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

33 pp

QUESTION PRESENTED

Whether, at the summary judgment stage in a Title VII case, it is proper to require a plaintiff to present evidence beyond that necessary to establish a *prima facie* case and that which could cause a factfinder to disbelieve a defendant's proffered legitimate, nondiscriminatory reason for adverse employment action.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Petitioner, Eduardo Hernandez, and Respondent, Marvin Runyon, Postmaster General of the United States Postal Service. The same parties are before this Court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES..... iv

OPINIONS BELOW..... 1

JURISDICTION..... 1

CONSTITUTIONAL PROVISIONS INVOLVED..... 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE..... 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. THERE IS A SPLIT AND CONFUSION AMONG THE CIRCUITS AS TO WHETHER A PLAINTIFF MUST PRESENT EVIDENCE, AT THE SUMMARY JUDGMENT STAGE, BEYOND THAT NECESSARY TO ESTABLISH A *PRIMA FACIE* CASE AND THAT WHICH COULD CAUSE A FACTFINDER TO DISBELIEVE A DEFENDANT'S PROFFERED REASON 5

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994) 6

Barrow v. New Orleans S.S. Ass'n, 10 F.3d 292 (5th Cir. 1994) 6

Cliff v. Board of School Commissioners, 42 F.3d 403 (7th Cir. 1994) 7

Collier v. Budd Co., 66 F.3d 886 (7th Cir. 1995) 6, 7

Gallo v. Prudential Residential Services, 22 F.3d 1219 (2nd Cir. 1994) 6

Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913 (11th Cir. 1993) 7, 8

Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 84 F.3d 1380 (11th Cir. 1996) 5, 8

Kobrin v. University of Minnesota, 34 F.3d 698 (8th Cir. 1994) 7

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 4, 6

McNabola v. Chicago Transit Authority, 10 F.3d 501 (7th Cir. 1993) 7

Perdomo v. Browner, 67 F.3d 140 (7th Cir. 1995) 7

Randle v. City of Aurora, 69 F.3d 441 (10th Cir. 1995) 7

Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328 (8th Cir. 1996) 5

TABLE OF AUTHORITIES – Continued

Page

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) 3, 7, 8, 9

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 4

Washington v. Garrett, 10 F.3d 1421 (9th Cir. 1993) 7

Woods v. Friction Materials, Inc., 30 F.3d 255 (1st Cir. 1994) 6

Woroski v. Nashua Corp., 31 F.3d 105 (2nd Cir. 1994) 5

LAW REVIEWS/PERIODICALS

Development in the Law – Employment Discrimination, 109 Harv. L. Rev. 1579 (1996) 9

Jody H. Odell, *Between Pretext Only and Pretext Plus: Understanding St. Mary's Honor Center v. Hicks and Its Application to Summary Judgment*, 69 Notre Dame L. Rev. 1251 (1994) 10

OPINIONS BELOW

The United States District Court, Southern District of Florida, granted summary judgment in favor of Respondent in an unpublished order. App. at 3. The Eleventh Circuit Court of Appeals affirmed the district court in an unpublished decision rendered on July 17, 1996. App. at 1.

Petitioner timely filed this Petition for Writ of Certiorari.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Seventh Amendment.

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, as amended.

STATEMENT OF THE CASE

This case presents the question of whether, at the summary judgment stage in a Title VII case, it is proper to

require a plaintiff to present evidence beyond that necessary to establish a *prima facie* case and which could cause a factfinder to disbelieve a defendant's proffered legitimate, nondiscriminatory reason for an adverse employment action.

Petitioner filed his *pro se* complaint on September 18, 1991 alleging that his termination from the United States Postal Service was the result of national origin discrimination and/or retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended. The complaint was filed against the United States Postal Service.

On or about May 1, 1995 Respondent filed a motion for summary judgment and a memorandum of points and authorities in support thereof. As the basis for its motion for summary judgment, Respondent argued, in part, that Petitioner was unable to introduce evidence that his termination was pretextual. Respondent then proffered as its legitimate, nondiscriminatory and nonretaliatory reason for terminating Petitioner that he did not meet the qualifications of a letter carrier. On or about September 7, 1995 Petitioner filed a response to Respondent's motion for summary judgment. Noting that Petitioner was proceeding *pro se* at the time, the district court considered various statements of Petitioner's co-workers attached to Petitioner's complaint in deciding Respondent's motion for summary judgment.

On or about October 15, 1995 the district court entered its order granting Respondent's motion for summary judgment. In its order the district court found that although Petitioner had established a *prima facie* case and that he was qualified for the position of a letter carrier, he

failed to present evidence which would establish that Respondent's proffered reason for the termination was a pretext *and* that Petitioner's termination was taken for discriminatory or retaliatory reasons. App. at 12.

On December 12, 1995 Petitioner filed a notice of appeal with the district court. On July 17, 1996 the Eleventh Circuit Court of Appeals affirmed the district court's grant of summary judgment to Respondent.

SUMMARY OF THE ARGUMENT

In considering Respondent's motion for summary judgment the district court erred by requiring Petitioner to present evidence beyond that necessary to establish a *prima facie* case and which could have caused the factfinder to disbelieve Respondent's proffered legitimate, nondiscriminatory and nonretaliatory reason for terminating Petitioner's employment. In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), this Court held that a factfinder's disbelief of the reason put forth by a defendant may, along with the elements of plaintiff's *prima facie* case, permit an inference of intentional discrimination. Given that at the summary judgment stage a court need only decide if there is a genuine issue of material fact, requiring a plaintiff to present evidence beyond that necessary to establish a *prima facie* case and that which could cause a factfinder to disbelieve a defendant's proffered reason unduly burdens a plaintiff at the summary judgment stage of a case and usurps the role of the jury as the factfinder.

ARGUMENT

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and its progeny established a three-stage burden-shifting framework setting forth the order and allocation of proof in employment discrimination cases. At the first stage the plaintiff bears the burden of establishing a *prima facie* case of discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). This *prima facie* case "creates a presumption that the employer unlawfully discriminated against the employee." *Id.* at 254. If the plaintiff establishes a *prima facie* case, the second stage shifts the burden of production to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* at 253. If the defendant satisfies this burden, the presumption raised by the *prima facie* case is rebutted and "drops from the case." *Id.* at 255 n. 10. The third and final stage shifts the burden of persuasion back to the plaintiff to show that the defendant's proffered reason was a pretext for discrimination. *Id.* at 253.

In *Hicks* this Court, attempting to resolve a split in the circuits, identified what evidence a plaintiff must present to prevail in an employment discrimination case. Before *Hicks* some circuits required a plaintiff to present evidence only to prove the defendant's proffered legitimate, nondiscriminatory reason was false. Once this was done these circuits held that a plaintiff was entitled to a judgment as a matter of law. Other circuits required a plaintiff to present evidence that not only established that the defendant's reason was false, but that the defendant acted with discriminatory intent as well. In *Hicks* this Court rejected both approaches and instead held that

evidence creating disbelief in the defendant's proffered reason, along with the elements of a plaintiff's *prima facie* case, without additional proof of discrimination, will permit, but does not require, the factfinder to infer the ultimate fact of intentional discrimination. *Id.*, 509 U.S. at 511.

I. There is a Split and Confusion Among the Circuits as to Whether a Plaintiff Must Present Evidence, at the Summary Judgment Stage, Beyond That Necessary to Establish a *Prima Facie* Case and that Which Could Cause a Factfinder to Disbelieve the Proffered Reason of Defendant

Since *Hicks* several courts, like the lower courts in this case, have granted summary judgment to the defendant despite evidence by the plaintiff of both a *prima facie* case and that which could cause a factfinder to disbelieve the defendant's proffered reason for the adverse employment action. *See, Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328 (8th Cir. 1996) (affirming grant of summary judgment to defendant even though plaintiff had "'plainly' created factual disputes with respect to whether [defendant's] proffered reasons were credible"); *Woroski v. Nashua Corp.*, 31 F.3d 105, 108-09 (2nd Cir. 1994) ("to defeat a defendant's properly supported motion for summary judgment, a plaintiff must show that there is a material issue of fact as to whether (1) the employer's asserted reason for discharge is false or unworthy of belief *and* (2) more likely than not the [unlawful basis] was the real reason for the discharge.") (emphasis in original); *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 84 F.3d 1380, 1386 (11th Cir. 1996) ("Evidence allowing a

trier of fact to discredit an employer's proffered reason for an adverse employment decision thus alone is not enough for a plaintiff to survive a motion for judgment as a matter of law.").[1]

Other courts, however, have held that at the summary judgment stage a plaintiff need only present evidence of a *prima facie* case and that the defendant's reason is not to be believed. In *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994) the Seventh Circuit recognized that the question

> in reviewing the grant of summary judgment is only whether . . . [the plaintiff] produced evidence from which a rational fact-finder could infer that the company lied in saying that it fired . . . him because he was an unsatisfactory worker. If the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one, such as [discrimination], may rationally be drawn. This is the common sense behind *McDonnell Douglas*.

Anderson, 13 F.3d at 1124. In *Collier v. Budd Co.*, 66 F.3d 886 (7th Cir. 1995) the Seventh Circuit further defined what a plaintiff must show at the summary judgment stage to get to a jury.

> [A plaintiff] must show either "'(1) that the proffered reason had no basis in fact, (2) that the proffered reasons did not actually motivate [his]

---

[1] Other such cases include: *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994); *Gallo v. Prudential Residential Services.*, 22 F.3d 1219 (2nd Cir. 1994); and *Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292 (5th Cir. 1994).

> discharge, *or* (3) that they [the reasons] were insufficient to motivate [the] discharge.'"

Collier, 66 F.3d at 892, *citing*, *Cliff v. Board of School Commissioners*, 42 F.3d 403, 412 (7th Cir. 1994), *quoting*, *McNabola v. Chicago Transit Authority*, 10 F.3d 501, 513 (7th Cir. 1993) (emphasis added). *See also Perdomo v. Browner*, 67 F.3d 140, 145 (7th Cir. 1995) ("Because a fact-finder may infer intentional discrimination from an employer's untruthfulness, evidence that calls truthfulness into question *precludes* a summary judgment.") (emphasis added); *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995) ("If the plaintiff succeeds in showing a prima facie case and presents evidence that the defendant's proffered reason for the employment decision was pretextual – i.e. unworthy of belief, the plaintiff can withstand a summary judgment motion and is entitled to go to trial.").[2]

Indeed, the Eleventh Circuit itself appears to have taken inconsistent positions reflecting the split and confusion among the circuits on this issue. In *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913 (11th Cir. 1993) the court reviewed a grant of summary judgment to a defendant, noting that:

---

[2] Other such cases include: *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) ("Because as *St. Mary's* recognizes, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a *prima facie* case and showing of pretext without anything more, there will always be a question for the factfinder once a plaintiff establishes a *prima facie* case and raises a genuine issue as to whether the employer's explanation for its action is true. Such a question cannot be resolved on summary judgment."); and *Kobrin v. University of Minnesota*, 34 F.3d 698 (8th Cir. 1994).

> [i]n order to establish pretext, the plaintiff is not required to introduce evidence beyond that already offered to establish the prima facie case. Evidence already introduced to establish the prima facie case may be considered, and "[i]ndeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation and establish pretext."

Hairston, 9 F.3d at 921, *citing*, *Burdine*, 450 U.S. 248, 256 n. 10; *but cf. Isenbergh*, *supra*.

The burden placed on plaintiffs at the summary judgment stage by the courts which have required evidence beyond that necessary to establish a *prima facie* case and which could cause a factfinder to disbelieve the defendant's proffered reason, have prevented the factfinder from engaging in the analysis and making the inference expressly found to be permissible in *Hicks*.

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is *required*."

Hicks, 509 U.S. at 511, *citing*, *Hicks v. St. Mary's Honor Center*, 970 F.2d at 493 (8th Cir. 1992) (emphasis in original) (footnotes omitted).

The courts rendering summary judgment for defendants in cases in which the plaintiff presents evidence of a *prima facie* case and which could cause a factfinder to disbelieve the defendants' proffered reason are, in essence, making a credibility assessment as to whether the dishonesty of the defendants is merely a good faith mistake or a pretext for discriminatory motive. Making such a factual determination at the summary judgment stage usurps the jury's role and denies a plaintiff his or her right under the Seventh Amendment.

Several commentators have examined this precise issue and recognized the need for clarification from this Court. In *Development in the Law Employment Discrimination*, 109 Harv. L. Rev. 1579 (1996) the author concluded, in reviewing the varying standards employed by courts at the summary judgment stage after *Hicks*, that

> [t]he entire area of shifting burdens is replete with confusion, and guidance is needed desperately. The wake of ambiguous Court precedents has left courts both baffled, as seen in the direct-evidence/direct-track conundrum, and free to manipulate procedural burdens to achieve substantive ends (all too often to the disempowerment of plaintiffs), as seen in the perpetuation of the pretext-only/pretext-plus debate in the post-*Hicks* era. Indeed, *Hicks* is most disappointing as a squandered opportunity. The Court will have to grant certiorari again, both to remedy the confusion that persists despite its recent attempt to resolve the issue and to reassert its commitment to combat the evils of employment discrimination.

Id. at 1602 (footnotes omitted). *See also* Jody H. Odell, *Between Pretext Only and Pretext Plus: Understanding St. Mary's Honor Center v. Hicks and Its Application to Summary Judgment*, 69 Notre Dame L. Rev. 1251 (1994).

CONCLUSION

Based on the foregoing, Petitioner respectfully requests this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

ARTHUR SCHOFIELD, ESQ.
JAMES K. GREEN, P.A.
One Clearlake Centre, Suite 1602
250 Australian Avenue
West Palm Beach, Florida 33401
(561) 659-2029
Fla. Bar No. 984434

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-5535
Non-Argument Calendar

D. C. Docket No. 91-8570-CV-DTKN

EDUARDO HERNANDEZ,

Plaintiff-Appellant,

versus

POSTMASTER GENERAL, MARVIN RUNYAN,
United States Postal Service,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(Filed July 17, 1996)

Before ANDERSON, BIRCH and BARKETT, Circuit Judges.

PER CURIAM:

Eduardo Hernandez appeals from an adverse summary judgment granted to Marvin Runyon, Postmaster General, United States Postal Service, ("employer"), upon

his *pro se* complaint claiming that he was unlawfully terminated from his position with the West Palm Beach Post Office.

In granting the summary judgment, the district court found the record replete with evidence that the employer "would easily be able to carry its burden of establishing a nondiscriminatory reason for plaintiff's termination at trial." The district court also found that Hernandez had failed to produce sufficient evidence that the employer's articulated, legitimate, nondiscriminatory reason for firing him was merely pretextual.

With respect to Hernandez's [sic] claim of retaliatory discharge, the district court again found that the employer had met its burden of articulating a nonretaliatory reason for Hernandez's [sic] termination and that there was insufficient evidence of pretext.

We have reviewed the record, find no reversible error, and, accordingly, the summary judgment is

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EDUARDO HERNANDEZ,

Plaintiff,
pro se

vs.

MARVIN RUNYAN,
POSTMASTER GENERAL,
UNITED STATES POSTAL
SERVICE

Defendant.

_____ /

CASE NO. 91-8570-
CIV-HURLEY

(Filed Oct. 15, 1995)

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the court upon defendant's motion for summary judgment. Plaintiff, Eduardo Hernandez, filed a *pro se* complaint claiming that he was unlawfully terminated from his position with the Lake Worth Post Office. Plaintiff contends that he was discriminated against because of his national origin and for reprisal due to his filing of an EEO complaint. Plaintiff was advised of the summary judgment standard pursuant to *Griffith v. Wainwright*, 772 F.2d 822, 825-26 (11th Cir. 1985).[1]

Mr. Hernandez, a Hispanic male, was employed by the Lake Worth Post Office from April 23, 1988 until he

[1] *See* D.E. 58.

was removed from his position on June 25, 1988. Following his removal, Mr. Hernandez filed an informal EEO complaint. A United States Postal Service EEO settlement was entered on July 27, 1988. The settlement provided that Mr. Hernandez would be rehired as a part-time flexible letter carrier at the West Palm Beach Post Office on August 18, 1988. The settlement further provided that "[t]he complainant understands that he will enter into another 90-day probationary period. Failure to meet the requirements during the probationary period will result in termination."

Mr. Hernandez worked at the Palm Beach Gardens station of the West Palm Beach Post Office from August 13, 1988 until November 5, 1988, when he was removed from his position. Mr. Hernandez asserts that his removal was based upon: (1) his national origin and (2) reprisal for the filing of the EEO complaint after his removal from the Lake Worth office. Defendant contends that Mr. Hernandez has failed to establish a *prima facie* case pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "The purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Wouters v.*

Martin County, Fla., 9 F.3d 924, 928 (11th Cir. 1993) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). It is inappropriate at the summary judgment stage for the court to weigh the evidence and determine the truth of the matter. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 251, 106 S. Ct. 2505, 2511 (1986). Rather, the court's function is to determine whether there exists an issue for trial.

Where, as here, the non-moving party bears the burden of proof on an issue at trial, the moving party, in order to prevail, must do one of two things: show that the non-moving party has no evidence to support its case, or present "affirmative evidence demonstrating that the non-moving party will be unable to prove its case at trial." *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437-38 (11th Cir. 1991) (en banc). In order to determine whether the movant has met its burden, this court reviews the facts in the light most favorable to the non-movant and resolves all factual disputes in favor of the non-movant. *Smith v. Jefferson Pilot Life Ins. Co.*, 14 F.3d 562, 566 (11th Cir.) *cert. denied*, 115 S. Ct. 57 (1994). "If the movant successfully discharges its burden, the burden then shifts to the non-movant to establish, by going beyond the pleadings, that there exist genuine issues of material facts." *Hairston v. Gainesville Sun Publishing*, 9 F.3d 913, 918 (11th Cir. 1993) (citing *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). "[A] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Summary judgment is appropriate in Title VII cases "when evidence of discriminatory intent is totally lacking." *Hairston v. Gainesville Sun Publishing*, 9 F.3d 913, 918 (11th Cir. 1993). The court has engaged in a thorough review of the record, according due leniency to the *pro se* plaintiff, and concludes that the defendant has met its burden by showing that there is an absence of evidence to support the plaintiff's case. There is no genuine issue of material fact in the record. Defendant is therefore entitled to judgment as a matter of law.

Discrimination due to national origin

"Congress enacted Title VII and its progeny to assure equality of employment opportunities regardless of race, color, religion, sex, or national origin." *Walker v. Nationsbank of Florida, N.A.* (11th Cir. 1995) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)). In order to evaluate plaintiff's claims of national origin discrimination, the court conducts a three step burden-shifting analysis. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973). First, the plaintiff has the initial burden of establishing a *prima facie* case of discrimination.[2] Plaintiff may accomplish this by showing:

---

[2] Plaintiff may also establish a *prima facie* case of discrimination by presenting direct evidence of discriminatory intent or statistical evidence. *See Walker v. Nationsbank, N.A.*, 53 F.3d 1548, 1555 (11th Cir. 1995). Because the record is devoid of such evidence, this order focusses on the four-pronged test established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

(1) that he is a member of a minority;

(2) that he was qualified for the position held;

(3) that, despite his qualifications, he was terminated; and

(4) that, after his termination, he was replaced by a person outside the protected class.

See McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802 (1973); *Walker v. Nationsbank, N.A.*, 53 F.3d 1548, 1556 (11th Cir. 1995). The fourth element is not necessarily required. That is, "[a] plaintiff may have a *prima facie* case based on the first three requirements despite the fact that the employer hired a minority to fill the vacancy left by the plaintiff." *Edwards v. Wallace Community College*, 49 F.3d 1517, 1521 (11th Cir. 1995). "However, the court must consider whether the fact that a minority was hired overcomes the inference of discrimination otherwise created by the evidence presented by the plaintiff." *Id.*

If plaintiff establishes a *prima facie* case, a presumption that the employer discriminated against him or her is created. *See St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747 (1993). Thus, once plaintiff has demonstrated a *prima facie* case, the burden shifts to the employer to produce evidence and "articulate some legitimate nondiscriminatory reason for the employee's [termination]." *Id.* "This intermediate burden is 'exceedingly light.' " *Turnes v. AmSouth Bank, N.A.*, 36 F.3d 1057, 1061 (11th Cir. 1994).

Finally, at the summary judgment stage, the burden shifts back to the plaintiff to raise a genuine factual question as to whether the employer's reason for the termination was merely pretextual. "[P]laintiff's burden

at summary judgment is met by introducing evidence that could form the basis for a finding of facts, which when taken in the light most favorable to the non-moving party, could allow a jury to find by a preponderance of the evidence that the plaintiff has established pretext, and that the action taken was [discriminatory]." *Hairston v. Gainesville Sun Publishing*, 9 F.3d 913, 921 (11th Cir. 1993). "The plaintiff may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1123 (11th Cir. 1993) (quoting *Texas Dept. of Commun. Affairs v. Burdine*, 450 U.S. 248 (1981)). Factors which may be considered include: (1) the employer's treatment of plaintiff during the term of employment; (2) the employer's general policy with respect to minority employees and (3) the employers [sic] treatment of non-minority employees who demonstrated the same job performance skills as plaintiff. *See McDonnell Douglas*, 411 U.S. at 805.

While the burden of production shifts to the employer after a *prima facie* case is established, the burden of persuasion always remains with the plaintiff. *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747 (1993). Therefore, once the employer produces evidence to rebut plaintiff's *prima facie* case, "the trier of fact proceeds to the ultimate question: whether plaintiff has proven that the defendant intentionally discriminated against him because of his race." *Id.* at 2749 (internal quotations omitted).

Plaintiff has made out a *prima facie* case of national origin discrimination. A *prima facie* case is "such as will

prevail until contradicted and overcome by other evidence." BLACK'S LAW DICTIONARY 825 (6th ed. 1991). As stated above, plaintiff must produce evidence which establishes that:

> (1) he is a member of a protected class;
>
> (2) he was qualified for the position held;
>
> (3) despite his qualifications, he was terminated; and
>
> (4) after his termination, he was replaced by a person outside the protected class.

See McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802 (1973); *Walker v. Nationsbank, N.A.*, 53 F.3d 1548, 1556 (11th Cir. 1995).

It is undisputed that the plaintiff, a Hispanic male, is a member of a protected class. Thus, the first requirement of the *McDonnell Douglas* four-pronged test is met. To support the second and third elements, plaintiff has provided the opinions of various coworkers regarding his job performance.[3] For example:

---

[3] Plaintiff has submitted unsworn statements of purported former coworkers attesting to his job qualifications. Such statements are not affidavits or sworn statements within the meaning of Rule 56 and the court could have permitted plaintiff to supplement the record by remedying the deficiencies. *See Gordon v. Watson*, 622 F.2d 120 (5th Cir. 1980). The court chose not to do so because the disposition of this case would not have been altered even if the statements were sworn because the statements are insufficient to raise a genuine material factual issue. The court has therefore thoroughly reviewed the record and all of plaintiff's filings as though admissible evidence.

> I was under the impression that Eduardo had been making significant improvements in his ability to meet standards for street delivery. He appeared to be enthusiastic and put forth major effort in his quest to become a carrier.[4]
>
> I have carried the route after he has assisted in setting it up and found his performance to be excellent. On the occasions when he has delivered I have encountered no problems on my return to the route.[5]
>
> Hernandez carried my route (3) times. An improvement was shown each day. He carried the pieces of route in the time required.[6]
>
> His work was satisfactory and his attitude was good.[7]

The foregoing excerpts arguably demonstrate that plaintiff was terminated despite his qualifications. Plaintiff has failed to meet the fourth prong because no evidence has been adduced that he was replaced by one outside of the protected class. The failure to satisfy this prong, however, does not preclude a finding that a *prima facie* case has been established. *See Edwards v. Wallace Community College*, 49 F.3d 1517, 1521 (11th Cir. 1995).

Plaintiff having made out a *prima facie* case of national origin discrimination, the burden of production

---

[4] Plaintiff's "Affidavit A," David A. Benson, Regular Carrier Route 801.

[5] Plaintiff's "Affidavit B," Clinton R. Bostick.

[6] Plaintiff's "Affidavit C," D.J.S.

[7] Plaintiff's Affidavit E, Tony Benitez, EEO Investigative Affidavit.

shifts to the defendant to articulate a non-discriminatory reason for plaintiff's termination. Defendant has clearly met this burden. The record is replete with evidence that Mr. Hernandez did not meet the qualifications of a letter carrier. Judy May Shipley, plaintiff's supervisor, testified extensively at the EEOC hearing regarding plaintiff's difficulties undertaking his job tasks. Specifically:

> [Mr. Hernandez] had great difficulty just trying to understand how to deliver mail . . . [H]e would deliver one house some letters, he would go across the street and deliver some magazines to another house and go back to the same original house to deliver the magazines again. And he was constantly going back and forth and it was a real big problem with him understanding how to deliver the mail. He would deliver things incorrectly with customer complaints getting the mail back in the mail the following day to be redelivered. He would be sent out with parcels and he would return with almost as many parcels as he took out for the day. It was a repeating problem. He didn't ever seem to progress to an understanding of how to do the job although he was given ample instruction and training. He just never seemed to grasp the job.[8]

Ms. Shipley documented plaintiff's difficulties on a daily basis. (*See* Gov't Exs. 3-29). Each evaluation is filled with comments regarding Mr. Hernandez' inability to meet job requirements. For example:

> Carrier is very slow pulling down letters. Slow on street time. Has shown no improvement yet on street time.

---

[8] *See* EEOC transcript.

> [C]arrier is very slow. He is not showing improvement on office pull down or street time. Customers are complaining that he goes to the same street twice.
>
> Cannot find way on route. Has been shown 3 times with regular carrier. Has delivered 4 times himself. Still lost.
>
> Took 14 parcel post. Delivered 2. Brought back, 12. No notice left.
>
> This carrier is totally lost, as if he has never seen these streets before . . . seems to be untrainable.
>
> Returns with same parcels day after day.

Another supervisor, J. Solis, documented plaintiff's specific problems with: accuracy, thoroughness, the ability to meet casing standards and the ability to line up and pull down flats, taking instructions, and cooperation with management. (*See* Gov't Exs. 14-16).

The employer has provided evidence showing that it would easily be able to carry its burden of establishing a nondiscriminatory reason for plaintiff's termination at trial. Defendant is therefore entitled to summary judgment unless there is a genuine issue that its stated reason for termination is a pretext for national origin discrimination.

A review of the record reveals that plaintiff has failed to introduce evidence that could form the basis for a finding of facts, which when taken in the light most favorable to the non-moving party, could allow a jury to find by a preponderance of the evidence that the plaintiff has established pretext, and that the action taken was discriminatory. Plaintiff's only allegation regarding

national origin discrimination involves an incident in which Ms. Shipley asked him to read a performance evaluation aloud. It is plaintiff's view that this was done to ascertain his fluency in English. Defendant maintains that she was trying to determine if Mr. Hernandez understood the comments on the evaluation. Given the overwhelming evidence regarding Mr. Hernandez's [sic] confusion and inability to follow instructions, the court finds that no reasonable finder of fact could find by a preponderance of the evidence that the justification for termination was pretextual and that the action taken was discriminatory.[9]

Retaliation

"The burden of proof in Title VII retaliation cases is governed by the framework established in *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973)." *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913, 919 (11th Cir. 1993). In order to establish a *prima facie* case of retaliation, plaintiff must show: "(1) a statutorily protected expression, (2) an adverse employment action, and (3) a causal link between the protected expression and the adverse action." *Id.* "[T]he 'causal link' element [requires] merely that the plaintiff establish that the protected activity and the

---

[9] Quite to the contrary, the record shows that Ms. Shipley tried to accommodate any language barrier which may have existed. The supervisor sent Mr. Hernandez out with M. Garcia who explained the carrier duties in Spanish and English. *See* Ex. 5A & 6. It appears that Mr. Hernandez had difficulty in understanding instructions regardless of the language used to communicate with him.

adverse action were not wholly unrelated." *Simmons v. Camden County Board of Ed.*, 757 F.2d 1187, 1189 (11th Cir.) *cert. denied*, 474 U.S. 981 (1985). "At a minimum, plaintiff must generally establish that the employer was actually aware of the protected expression at the time it took the adverse employment action." *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913, 919 (11th Cir. 1993) (quoting *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163 (11th Cir. 1993)).

The court finds that plaintiff has established a *prima facie* case of retaliation: (1) Mr. Hernandez engaged in a protected activity when he filed a charge with the EEO; (2) he was terminated; and (3) there is arguably a causal link between these two events. The record is clear that supervisor Judy Shipley was aware of plaintiff's prior EEO activity. Plaintiff has therefore met the minimum requirement of establishing a causal link between the protected activity and his termination.

Plaintiff having made out a *prima facie* case, the burden shifts to the employer to rebut the presumption of retaliation and produce legitimate reasons for the termination. For the same reasons articulated above, defendant has clearly met its burden. Defendant's states [sic] reasons for Mr. Hernandez's [sic] termination overcome any inference of retaliation and further warrant the conclusion that the protected activity and termination were wholly unrelated. The record is devoid of evidence suggesting pretext. Viewing the evidence in the light most favorable to plaintiff, the court finds that no reasonable trier of fact could find otherwise.

Court-Appointed Counsel

Plaintiff filed a request for counsel which was denied by Magistrate Judge Johnson who found that he had the financial ability to obtain counsel. The case was transferred to the undersigned. Plaintiff, during a status conference, again requested court-appointed counsel and submitted a written request to the court.[10] "A Title VII plaintiff has no automatic right to appointed counsel. However, 42 U.S.C. § 2000e-5(f)(1) authorizes appointment of counsel 'in such circumstances as the court may deem just.' " *Hunter v. Department of Air Force Agency*, 846 F.2d 1314, 1317 (11th Cir. 1988). The following may be considered by a district court: (1) the merits of the plaintiff's claims of discrimination (including the EEOC's view of the merits of the claim); (2) the efforts taken by the plaintiff to obtain counsel; (3) plaintiff's ability to understand the relevant substantive and procedural issues, *id.*; and (4) plaintiff's financial inability to retain counsel. *Reynolds v. Roberts*, 846 F. Supp. 948, 951 (M.D. Ala. 1994) (quoting *Luna v. International Assoc. of Machinists and Aerospace Workers Local # 36*, 614 F.2d 529, 531 (5th Cir. 1980)).

The court recognizes Mr. Hernandez' efforts in obtaining counsel. He represents that he has contacted two law schools and two private attorneys. The balance

---

[10] A review of the record indicates that plaintiff did not file his request with the Clerk of Court. Therefore, the court's written copy of the "Request for Attorney" will be filed simultaneously herewith.

of the other considerations, however, weighs against the appointment of counsel.[11]

Accordingly, it is hereby

ORDERED and **ADJUDGED** as follows:

1. Defendant's motion for summary judgment is **GRANTED**.

2. The Clerk of Court shall enter final judgment in accordance with Rule 58, Fed.R.Civ.P.

3. The Clerk of Court shall **CLOSE** this case.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 9th day of Oct. ~~September~~, 1995.

/s/ Daniel T. K. Hurley
Daniel T. K. Hurley
United States District Judge

Copies furnished to:

Eduardo Hernandez, *pro se*
333 Farmdale Road
West Palm Beach, FL 33406

Eduardo Hernandez
5001 El Claro Circle
West Palm Beach, FL 33415

Cynthia A. Everett, Esq.
AUSA
99 NE 4th Street
Suite 330
Miami, FL 33132

---

[11] The court did, however, refer Mr. Hernandez' case to the Legal Aid Society of Palm Beach County, who declined representation.

Anthony W. DuComb, Esq.
San Francisco Field Office
United States Postal Service
577 Airport Blvd.
Suite 200
Burlingame, CA 94010-2040